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Res Judicata as Between Joint Tort-Feasors

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NOTES AND COMMENT

RES JUDICATA AS BETWEEN JOINT TORT-FEASORS—In *Snyder v. Marken,* a negligence action between automobile owners growing out of a collision which resulted in injuries to a third person as well as to the plaintiffs, a judgment in the action by the third person was held unavailable as a defense, upon the ground that parties to a judgment are not bound by it in subsequent controversies between each other unless they were adversaries in the other action wherein the judgment was entered, that is, unless there were issues as between the co-defendants in that action.

The judgment held not *res judicata* in the *Snyder* case, *supra,* was in favor of the defendants, but had it been against the defendants or in favor of one and against the other of them, the reason underlying that decision would have called for the same disposition of a defense of *res judicata.* It is the nature of the issues in the former action, not the result of that action, which determines whether or not the defendants were adversaries.

[1] 116 Wash. 270 and 700, 199 Pac. 302, 22 A. L. R. 1272 (1921).

Res judicata in liability-over actions may involve considerations in addition to the nature of the issues in the former action.

Tort-feasors may be divided into two classes; those who are guilty of negligent actions or omissions in person, and those who sustain such a relationship to others that they are liable as a matter of law for the negligent acts or omissions of such others. Of the latter class are principals and masters.[2] One who is liable for the negligence of another may have been guilty, of course, of acts or omissions constituting independent negligence, in which event he would be of both classes.

Where liability exists only as a result of negligence of another, there may be a recovery over against him upon payment of a judgment in favor of the third person. In that event, the parties to the liability-over action are not deemed joint tort-feasors as between themselves; they sustain the relation of indemnitor and indemnitee.[3] It is otherwise where the plaintiff in the liability-over action was guilty of independent negligence, and recovery-over cannot be had.[4]

It may be observed, in passing, that there is some confusion in the decisions as to what constitutes independent negligence, due to treating a duty, non-delegable as between the third person and the defendant in the original action, as non-delegable so far as the parties to the liability-over action are concerned, or, due to treating a single duty as owing to the third person by both parties to the liability-over action,[5] which amounts to the same thing. Where performance of the duty owing the first person has been delegated to the defendant in the liability-over action, the plaintiff is not guilty of independent negligence precluding recovering from the defendant, unless the plaintiff had actual knowledge that the defendant was not performing that duty.

The rights of the parties to the liability-over action, as between themselves, may or may not be in issue in the original action. They seldom are. Needless to say, where they are not in issue, the judgment cannot affect such rights. However, where the relationship of the parties to the liability-over action is such that the defendant is liable over to the plaintiff, the latter may bind the former as to matters adjudicated in the original action by giving him notice that he will be looked to for indemnity in the event of an adverse judgment and by tendering him the defense of the action.[6]

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[2] *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572 (1901) *Morris v. Northwestern Imp. Co.*, 53 Wash. 451, 102 Pac. 402 (1909) *Armack v. Great Northern R. Co.*, 126 Wash. 533, 219 Pac. 52 (1923).

[3] *Doremus v. Root, supra, Alaska Steamship Co. v. Pacific Coast G. Co.*, 71 Wash. 359, 128 Pac. 654 (1912) *Snyder v. Marken*, note 1, *supra.*

[4] *Tacoma v. Bonnell*, 65 Wash. 505, 118 Pac. 642 (1911) *Alaska Steamship Co. v. Pacific Coast G. Co.*, note 3, *supra, Seattle v. Shorrock*, 100 Wash. 234, 170 Pac. 590 (1918) *Seattle v. Great Northern R. Co.*, 103 Wash. 294, 174 Pac. 4 (1918)

[5] *Alaska Pacific Steamship Co. v. Sperry Flour Co.*, 122 Wash. 642, 211 Pac. 761 (1922).

[6] 22 CYC. 99; 14 R. C. L. 62-63.

In *Seattle v. Peterson & Co.*,[7] and *Seattle v. Erickson*,[8] judgments were held *res judicata* without mentioning notice or opportunity to defend the original action. There may have been such notice and opportunity, and through inadvertence the fact was not referred to in the opinion. There the plaintiffs were held bound by the judgments upon the theory that they were founded on independent negligence and, therefore, the plaintiffs were estopped by the judgments. If the defendants had notice and opportunity to defend, they were correctly decided, otherwise they were not, for the reason that an estoppel by judgment must be mutual, a judgment is binding upon both parties or upon neither.[9] If the judgments were not binding on the defendants, which they would not be in the absence of such notice and opportunity, then the plaintiffs were not properly held bound thereby.

In *Alaska Pacific Steamship Co. v. Sperry Flour Co.*,[10] a judgment of dismissal entered upon the granting of a nonsuit in favor of the flour company for insufficiency of the evidence of negligence on its part was unsuccessfully interposed as a defense, the court basing its decision upon the adversaries rule applied in the *Snyder* case. To that extent the decision is obviously sound.

However, the court also held that upon re-trial the judgment in the original action should be binding upon the steamship company in four specific particulars directly in issue in that action. The decision on that point is unsound, for the reason that the flour company had neither notice nor actual knowledge that it would be looked to for indemnity in the event of judgment against the steamship company and had no opportunity to conduct the steamship company's defense, which affirmatively appears from the opinion. It is stated therein that the steamship company, the respondent, "did not at any time in that action give notice to appellant that it claimed that appellant was liable over to it, and did not tender to appellant the defense of that action, as is customary in cases where liability-over is thought to exist." As the flour company was not a party to and, hence, not bound by the judgment, the steamship company should have been held not bound by it in the particulars named or any other particular. The cases cited by the court in support of its holding in that respect go to the question of form of the notice, the form being held immaterial so long as the party against whom recovery-over was sought knew that the party held liable in the original action would look to him for indemnity. The defendant in the steamship company case did not have such knowledge and, furthermore, was not given an opportunity to take over the steamship company's defense.

In the *Alaska Steamship Co.* case, *supra,* the court overruled *Seattle v. Erickson, supra,* for the reason, apparently, that the defendant was

[7] 99 Wash. 533, 170 Pac. 140 (1918).

[8] 99 Wash. 543, 169 Pac. 185 (1918).

[9] *Bennett v. General Acc. & Assur. Co.*, 213 Mo. App. 421, 255 S. W 1076 (1923) *McCarthy v. Wm. H. Wood Lumber Co.*, 219 Mass. 566, 107 N. E. 439 (1914) 15 R. C. L. 956; 21 C. J. 1067.

[10] 107 Wash. 545, 182 Pac. 634, 185 Pac. 583 (1919).

dismissed out of the case on motion for nonsuit and, therefore, was not an adversary of the plaintiff. It is an interesting fact that the *Erickson* case, *supra,* was decided on the same day as *Seattle v. Peterson & Co., supra,* January 17, 1918, and no mention is made of the latter in the case overruling the former. Nor has the *Peterson & Co.* case been at any time the subject of comment. They cannot be distinguished in principle, since one who is not a party to an action is no more an adversary of a defendant than one who is dismissed out of an action on the granting of a nonsuit.

In *Puyallup v. Vergowe,*[11] distinguished in the *Alaska Steamship Co.* case, *supra,* on the proposition of independent negligence, the judgment was considered binding on the plaintiff in the liability-over action for the reason that it was held in the original action to be guilty of an independent act of negligence. But the opinion makes it clear that the defendant in the subsequent action had knowledge of the fact that the city looked to him for indemnity An opportunity to defend, no doubt, was given the defendant.

To summarize. In cases where the defendant in the liability-over action was given notice or knew that he would be looked to for the other's loss and had an opportunity to defend for the other, he is in legal effect a party to the original action and, hence, the matters properly adjudicated[12] are binding as between the parties to the subsequent action. Where independent negligence has been adjudicated, under such circumstances, the judgment precludes recovery-over. Of that class of decisions are also *Tacoma v. Bonnell*[13] and *Seattle v. Shorrock.*[14] Where the defendant in the liability-over action was not actually, or in legal effect as a result of notice or knowledge and opportunity to defend, a party to the judgment in the original action, it is not binding on either party, or even admissible in evidence.

In each of the liability-over cases above mentioned, the defendant was either not a party to the original action or was dismissed out of the case for insufficiency of the evidence to establish negligence on his part. Had the defendant in the liability-over action been a party to the original action and had judgment gone against both defendants in that action, or had a judgment, affirmatively establishing no negligence, been entered in favor of the defendant who was thereafter made a party defendant to the liability-over action, the result would not have been different.

The fact that the judgment in the original action was favorable to the one later made defendant in the liability-over action should not make the result different than had a nonsuit been granted him. The plaintiff in the original action would have "controlled the introduction of the evidence" as in the nonsuit case, unless there were issues which permitted the defendants to introduce evidence as to their rights and liabilities as between themselves, and the adversaries rule applied in

[11] 95 Wash. 320, 163 Pac. 779 (1917).
[12] *Seattle v. Shorrock,* note 4, *supra.*
[13] Note 4, *supra.*
[14] Note 4, *supra.*

the *Alaska Pacific Steamship Co.* case, *supra,* consequently, would be applied. If not adversaries within that rule, whether or not the judgment should be held *res judicata* would turn on notice given the other party or knowledge by him that he would be looked to for indemnity, and his opportunity to defend.

The adversaries rule and the rule requiring notice and opportunity to control the other party's defense should apply also where judgment goes against both parties. If the defendants in the original action were treated as adversaries and they were given a free reign in introducing evidence as to their differences, both would be bound under the adversaries rule;[15] otherwise, the judgment could be made binding, as to matters actually adjudicated, only by notice and opportunity to defend.

The controlling principles are well settled, but there is some confusion. Such confusion as exists has resulted from failure of the courts to keep in mind the adversaries rule, that a judgment is binding on both parties or neither, or that a judgment is not binding in the liability-over action where the defendant had no knowledge that indemnity would be expected of him or had no opportunity to defend.

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RECENT CASES

CONTRACTS—RESTRAINT OF TRADE.—Plaintiffs purchased defendant's stock in a company which operated a fleet of sight-seeing vehicles in Seattle. The defendant orally promised and agreed not to engage in similar employment and solicitation of tourist business for any competing company or himself in the city of Seattle. Thereafter, defendant assisted in organizing a competing company in Seattle and became active in soliciting the patronage of tourists in that city. *Held*: That such a contract limited as to space but unlimited as to time, is valid, and plaintiff is entitled to an injunction. *Barash v. Johnson*, 42 Wash. Dec. 64, 252 Pac. 680 (1927).

Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts when without limit as to time or place are invalid. *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522 (1913) *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355 (1868).

Under the early English law, any voluntary restraint by contract by an individual upon his right to carry on his trade or calling was void as against public policy. *Dyer's Case*, Y. B. 2 Hen. V p. 5, pl. 26 (1415) *Ipswich Tailor's Case*, 11 Coke 53a, 77 Reprint 1218. But under the modern English doctrine a covenant not to engage in a particular business limited to twenty-five years in time and wholly unlimited in space, is valid if it is coupled with a sale of the business and is necessary to protect the purchaser in what he has bought. *Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Co.*, 63 L. J. Ch. 908 (1894), App. Cas. 535, 11 R. 1, 71 L. T. 489, 6 E. R. C. 413. In the United States, the courts have regarded a contract unlimited in both time and space as a total restraint of trade, and void. *Roberts v. Lemont*, 73 Neb. 365, 102 N. W 770 (1905). And if the

[15] 15 R. C. L. 1013-1014.